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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 724

WILLIAM McGOWAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IRVING S. ABRAMS and
MAURICE A. WINKLER
100 North LaSalle Street
Chicago, Illinois
Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

WILLIAM McGOWAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, convicting the Petitioner of violations of Title 18, Sections 2312 and 371, United States Code, and sentencing him to the custody of the Attorney General and the order denying the Petition for Rehearing.

OPINIONS OF COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, Numbers 11156-11157, delivered *January 25, 1955*, is not yet reported. It appears as Appendix 1 to this Petition.

JURISDICTION.

The judgment of the Court of Appeals sought to be appealed was January 25, 1955.

The date of the Order denying the Petition for Rehearing was March 16, 1955.

The date of the Order staying issuance of the mandate was March 22, 1955.

The jurisdiction of this Court is invoked under Title 28 U.S.C.A. Section 1254 (1) as amplified by rule 19 (b) of the Supreme Court of the United States, which provides that the Court will, in considering the question whether it should grant review on Writ of Certiorari, consider cases "Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter". Title 18, Section 3231, United States Code, confers jurisdiction on the trial court.

QUESTIONS PRESENTED FOR REVIEW.

Was the Petitioner deprived of due process of law because of the manner in which the trial judge presided over the trial?

Was the Petitioner deprived of due process of law because of the remarks and utterances of the trial judge during the course of the trial?

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CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

United States Constitution: Amendment V:—

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution: Amendment VI:—

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 18, Section 2312, United States Code:—

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft knowing the same to have been stolen, shall be fined not more than $5000 or imprisoned not more than five years or both.

Title 18, Section 371, United States Code:—

If two or more persons conspire to commit any offense against the United States, or any agency thereof in any manner for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

STATEMENT OF THE CASE.
THE FACTS.

The Co-defendant, Sheldon Wheeler, was engaged in the recovery and repossession of automobiles subject to chattel mortgage and conditional sales contracts, and did his work in Chicago, Illinois, in a store containing offices with a used car lot alongside of it. The used car lot operated under the name of Shelley Auto Company, and was operated and controlled by the Co-defendant, Sheldon Wheeler. Mr. McGowan, your Petitioner, acted as agent for the company on a commission basis in the purchase and sale of used automobiles.

In August, 1950, a DeSoto automobile was acquired by the Shelley Auto Company, and was later taken to an automobile auction in Minnesota by McGowan on behalf of the company, and there sold to a party by the name of Millenacker, who paid for the car by check, the proceeds of which went to the Shelley Auto Company.

The company later acquired, in the course of its dealings, a 1950 Chrysler automobile, which your Petitioner, as representative of the company, drove to Minnesota and sold to Millenacker, the proceeds of the sale being turned over to the Shelley Auto Company.

The company later acquired another automobile, to wit, a 1950 Pontiac, which in or about November, 1950, was sold to Millenacker, who was an automobile dealer; the

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proceeds received from the sale were also turned over to the Shelley Auto Company. These three cars were a very small proportion of the automobiles acquired by the Shelley Auto Company and subsequently sold by it.

Numerous conversations with reference to various automobiles were had by the Shelley Auto Company, Mr. Wheeler and Mr. McGowan of that company, and Orville Millenacker, the purchaser of these three automobiles. At the time the first automobile was sold to Mr. Millenacker, he was apprised by your petitioner of the name, the address and the telephone number of the Shelley Auto Company, the seller of the automobile, and was later able, on numerous occasions, to contact the Shelley Auto Company as the result of this information so given to him by your Petitioner.

Some time after the last automobile was sold to Millenacker, police officers of the stolen auto detail of the Chicago Police Department came to the Shelley Auto Company and asked Mr. Wheeler to come into the stolen auto section of the Chicago Police Department, at 11th and State Streets, and pursuant to that request, Mr. Wheeler went to that section and remained there and was questioned from 9:30 in the morning until approximately 4:00 o'clock in the afternoon, at which time he left.

Numerous questions were asked concerning the automobiles sold to Mr. Millenacker, and the documents of title in connection with the same, and later Wheeler was called into the office of the State's Attorney of Cook County, and additional questions were asked with reference to these matters. Your Petitioner also appeared with Mr. Wheeler at the time of the interrogation and was later released, and later arrested by police officers of the City of Chicago and agents of the Federal Bureau of Investigation.

Your Petitioner was thereafter indicted in an indictment charging that he and Sheldon Wheeler, on October 9, 1950, transported or caused to be transported from Chicago to Austin, Minnesota, a 1950 Chrysler automobile, which automobile was a stolen one, and at the time of the transportation your Petitioner knew that the car was stolen. Said indictment charged the same offense on November 8, 1950, by the same Defendants by transporting a 1950 Pontiac automobile from Chicago, Illinois, to Austin, Minnesota, and further charged that on August 23, 1950, the same Defendants committed the same offense by transporting a 1950 DeSoto automobile from Chicago, Illinois, to Mason City, Iowa. The indictment further charged a conspiracy between the Defendant Sheldon Wheeler and your Petitioner and other persons to violate the statute with respect to stolen motor vehicles in interstate commerce.

The case proceeded to trial before a jury. (R. 18) Each defendant was represented by his own counsel.

During the course of the trial the presiding judge, in the presence of the jury, made numerous remarks and utterances indicating an attitude far from neutral. Counsel representing your Petitioner, upon cross-examination of the government's witness, Kessler, asked the following questions, and the following took place: (R. 26)

> "Q. And that is all you know about it? Nothing else?
>
> A. I know, yes, I had a car.
>
> The Court: Do you want him to tell all he knows about it, Mr. Winkler?
>
> Mr. Winkler: No.
>
> The Court: You don't want him to tell all he knows about it, do you?
>
> Mr. Winkler: What I want him to tell—
>
> The Court: You objected when counsel asked about insurance. Now, evidently, he may know something

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else about it, and I do not want you to get something in here that might prejudice your client, that you do not want to get in. If you want to go into it, we will let you go into it. This is up to you."

In connection with the cross-examination of the government's witness, Gregson, the following took place: (R. 44)

"Q. (By Mr. Berkson): Where was the secret number located?

Mr. Kahn: Objection.

Mr. Berkson: I think that is very material.

Mr. Kahn: I will object to that.

The Witness: That is very secret information, Your Honor, and it has absolutely nothing—

Mr. Berkson: If your Honor please, I am not interested in any particular location. I just want to know where underneath the car it was.

The Court: If you are not interested—

Mr. Berkson: I am not interested in the exact spot.

The Court: If you are not interested, I will certainly sustain the objection. I don't want to waste time getting information that your own men are not interested in. I will sustain the objection to the question."

In connection with the impeachment of the government's witness, Millenacker, Mr. Berkson, Counsel for the co-defendant, read a number of questions and answers from a deposition transcript, and was about to ask the witness whether those questions were asked of him and whether he made the answers, when the following occurred: (R. 93)

"Mr. Kahn: I will object to any further reading.

The Court: I was waiting for the objection. I will sustain the objection."

The government cross-examined the defendant Sheldon Wheeler with reference to his curiosity as to why the police asked him to come into the police station, and the following took place: (R. 199-200)

"Q. Weren't you curious about what they wanted you to come in for?

Mr. Berkson: Objection. He has answered.

Mr. Kahn: It is a different question.

The Court: He may answer.

By Mr. Kahn:

Q. Weren't you curious about what they wanted you to come down for?

A. I don't recall at the time. It is quite a while back. I don't remember word for word what took place.

Q. I didn't ask that. I just asked you if, in January of 1951, when the stolen auto police first asked you to come in, weren't you curious about what they wanted to talk to you about?

Mr. Winkler: To which he answered.

Mr. Kahn: No, he has not.

By the Witness:

A. I don't remember whether I was curious or not.

The Court: Are you Counsel for this defendant?

Mr. Winkler: No, but I am Counsel for another defendant in this case, and this testimony—

The Court: I just wanted to be sure. I don't question your right to participate, but I want to be sure who your client is.

Mr. Berkson: No, I think you remember I represent Mr. Wheeler and Mr. Winkler represents Mr. McGowan.

The Court: Are you critical of me, Mr. Berkson?

Mr. Berkson: No, I think you have a very good memory.

The Court: Proceed with the examination."

Counsel for the government proceeded to put a witness on the stand to identify certain photographs, and the following took place: (R. 138-139)

"Mr. Kahn: I do not have the photographer here. I didn't intend to call him. I will ask counsel if they object.

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The Court: All he can testify to them, in your opinion, is that these two pictures are accurate photographic representations of the cars in question?"

At the close of the government's case, Petitioner made his written motion for a judgment of acquittal which was denied. (R. 150) At the close of all the evidence, Petitioner made a motion for judgment of acquittal, which was denied. (R. 231-234)).

The trial court found your Petitioner guilty, and entered a judgment and commitment sentencing your Petitioner to the custody of the Attorney General for five years, and further ordered that the defendant shall pay to the United States of America a sum in the amount of $5,000.00. (R. 237-239)

On April 15, 1954 your Petitioner made a motion for a judgment notwithstanding the verdict, and a motion for a new trial, (R. 245-250), which motion was denied.

A Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, and a Statement of Points was duly and timely filed. (R. 252-253) (R. 257-259). Thereafter Petitioner appeared before the court on a petition to consolidate his appeal and that of the defendant Sheldon Wheeler, which said motion was allowed. (R. 255-257).

On January 25, 1955, the Court of Appeals for the Seventh Circuit affirmed the judgment of the lower court, and on March 16, 1955, your Petitioner's petition for rehearing was denied. On March 22, 1955, the United States Court of Appeals for the Seventh Circuit, on motion of your Petitioner, ordered that the issuance of the mandate be stayed for a period of thirty days pursuant to rule 25 of the rules of this Court.

ARGUMENT.

The United States Court of Appeals for the Seventh Circuit has decided herein questions in conflict with applicable analogous decisions of Federal Courts of Appeal in other circuits, and in conflict with applicable analogous decisions of this Court.

The Court below indicated that there was no occasion for the trial judge to be confused as to which attorney represented your Petitioner as per the remarks of the trial judge to that effect. (R. 199-200). The Court below also stated that they thought that it was error for the trial judge to volunteer the statement in the presence of the jury, that the objection that the government finally made in connection with the attempt of the defendant's counsel to impeach a government witness was the objection that the trial judge had been waiting for. (R. 93)

The Court below criticized the trial judge for the manner in which the trial was conducted, and then stated, "We have concluded that in view of the great weight of evidence in the case at bar pointing to the guilt of each defendant, that the errors were harmless *in this case* (italics ours), and that judgment of conviction should be affirmed".

Judge Finnegan, in a concurring opinion in the Court below, in speaking about the trial judge, stated,

> "The core problem of a trial judge lies in striking and maintaining that delicate balance between himself and the tryers of fact. Since the metes and bounds of judicial conduct during a trial by jury are difficult to delineate, much less to reduce to a concise simple formula, I think it is worth underscoring some of its aspects when appropriate instances arise.

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> Here the district judge's remarks were more impertinent than prejudicial. I am satisfied that no impingement of the defendant's rights resulted from the judge's unsuitable phraseology. When a trial judge assumes the role of a caustic critic he skirts the border of partisan participation."

Both the opinion of Chief Judge Duffy and the concurring opinion of Judge Finnegan state that the trial judge committed error in certain of his remarks, and in certain of his conduct in connection with the trial of this cause, but because of the fact that the evidence, in the opinion of the Court of Appeals, was sufficient to convict, the actions of the trial judge were not prejudicial to the defendant.

Judge Schnackenberg, in a concurring opinion, stated that he also saw error in the record, but in view of the evidence in the record showing the guilt of the defendants, these errors were not prejudicial.

The decision of the Court of Appeals in the instant case conflicts with the decisions of this Court in *Bollenbach* v. *U. S.*, 326 U. S. 607, and *Kotteakos* v. *U. S.*, 328 U. S. 750 and with the following analogous decisions of Circuit Courts of Appeals in other districts: *Robertson* v. *U. S.*, 171 Fed. 345 (D. C. Cir.); *Meeks* v. *U. S.*, 163 Fed. (2d) 598 (9th Cir.); *Peckham* v. *U. S.*, 210 Fed. (2d) 693 (9th Cir.); *U. S.* v. *Brandt*, 176 Fed. 653 (2d Cir); *Hunter* v. *U. S.*, 62 Fed. (2d), 217 (5th Cir.); *Baker* v. *U. S.*, 156 Fed. (2d) 386 (5th Cir.).

In *Bollenbach* v. *U. S.*, 326 U. S. 607, petitioner was convicted of conspiracy to violate the National Stolen Property Act. The Circuit Court of Appeals for the 2nd Circuit sustained the conviction. The petitioner and another defendant were indicted for the unlawful transportation of stolen securities with knowledge of the fact that they were stolen, and conspiracy to commit such offense. Severance was granted. In the petitioner's case the jury requested further

instructions and the trial judge instructed to the effect that the possession of stolen goods raised a presumption that they were transported in interstate commerce with knowledge that they were stolen. This instruction was definitely erroneous. However, the government insisted that there was abundant evidence to indicate that the petitioner was implicated in the crime from the very beginning, and that, therefore, the error was harmless. At pages 614 and 615 of the Opinion, Justice Frankfurter, speaking for the majority opinion, stated:

> "• • • it may not be amiss to remind that the question is not whether the guilt may be spelt out of a record, but whether the guilt has been found by a jury according to the procedure and standards appropriate for criminal trials.
>
> • • • Deviations from formal correctness do not touch the substance of standards by which guilt is determined in our courts, and it is these that Congress rendered harmless (citing cases). From presuming too often all errors to be 'prejudicial', the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the Appellate Court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of Appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be".

The Court thereupon reversed the decision of the Court of Appeals.

Following the line of the *Bollenbach* decision, and citing it with approval, was the case of *Meeks* v. *U. S.*, 163 Fed. (2d) 598, (9 Cir.). This was a prosecution for mur-

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der. The testimony of the government's witness, Hartness, without any other testimony, apparently would have been sufficient to justify a verdict of guilty. In the course of the trial the attorney for the defendant attempted to cross-examine the witness as to his motives for such testimony, and without objection from the plaintiff, the Court stopped the answer of the witness. When the defendant's attorney attempted to make inquiry of the witness as to whether he was a defendant in another criminal action, the Court adjudged the defendant's attorney in contempt, and refused to allow him to further represent the defendant until a fine was paid; and also shamed defendant's counsel before the jury. At page 602 of the Opinion the Court stated:

> "Apart from these three errors it is true that there was other evidence strongly adverse to appellant which the jury may or may not have believed. However, the Supreme Court does not permit an Appellate Court to speculate as to what witnesses the jury would believe or disbelieve. Indeed in view of the fundamental character of these errors *we may not affirm even if we are without doubt of appellant's guilt.* (Citing *Bollenbach* v. *U. S.*, 326 U. S. 607, 614, 615, 66 Sup. Ct. 402, 406, 90 L. Ed. 350".

The Court in this instance reversed the case.

In *Robertson* v. *U. S.*, 171 Fed. (2d) 345 (D. C. Cir.), the trial judge made a suggestion outside the presence of the jury as to a plea of guilty by the defendant, and later in the trial the defendant's attorney made a motion that the Court direct a verdict of acquittal. The Court, in denying that motion, said in the presence of the jury:

> "I want to say this; When this goes to the jury, I gave you an opportunity to dispose of this case. You remember that now."

The Court, in reversing the lower Court, said at page 346 of the Opinion:

"However, we cannot escape the conclusion that in both instances (one referring to remark above cited) the errors complained of were plain; that the natural and probable influence upon the jury was prejudicial, and that the right of appellant to a fair and impartial verdict of the jury was affected. Under these circumstances we are convinced that we should apply Rule 52 (b) of the Federal Rules of Criminal Procedure and take notice of errors, although they were not brought to the attention of the trial court."

In the case of *U. S.* v. *Brandt,* 196 Fed. (2d) 653, (2 Cir.), the trial judge cross-examined witnesses and made numerous remarks. At page 656 of the Opinion the Court says:

"Thus the examination of witnesses and discussions with counsel by the court were spotted with a number of remarks which were not of the form to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which defendants are entitled."

At page 655 of the Opinion the Court expresses itself as follows:

"A trial judge conducting a case before a jury is more than a mere moderator (citing cases) * * * But he nevertheless must remain the judge, impartial, judicious, and above all, responsible for the courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. Because of his power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence. (Citing *U. S.* v. *Minuse,* 2 Cir. 114 Fed. (2d) 36; *Martuccci* v. *Brooklyn Children's Aid Society,* 2 Cir. 140 Fed. (2d) 732; *U. S.* v. *Marzano,* 2 Cir. 149 Fed. (2d) 923."

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In the case of *Kotteakos* v. *U. S.*, 328 U. S. 750, this Court, by its decision, stated that if the error committed may have influenced the jury so that its natural effect would be to prejudice a litigant's substantial rights, this would be sufficient to reverse the decision. The test is the impact of the error on the minds of the jury.

In the case of *Peckham* v. *U. S.*, 210 Fed. (2d) 693, (D. C. Cir.), the defendant was convicted of abortion. In the course of the trial the judge made belittling remarks directed at the trial counsel, which at times indicated hostility, even though the judge was provoked, and he restricted cross-examination. The Court held that these remarks of the judge and his lack of impartiality demonstrated a bias which might well have influenced the jury, and reversed the case.

The guarantee of the Fifth Amendment to the Constitution of the United States that "No person shall be * * * deprived of life, liberty or property without due process of law; * * * and the provision of the Sixth Amendment to the Constitution of the United States that "In all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *" have been construed to grant a defendant the right to a fair trial by an impartial presiding judge. In *National Labor Relations Board* v. *Ford Motor Company*, 114 Fed. (2d) 905 (6 Cir.), the Court stated at page 909, "We may accept as fundamental the axiom that a trial by a biased judge is not in conformity with due process of law.

In *Baker* v. *U. S.*, 156 Fed. (2d), 386 (5 Cir.), the Court stated at page 389 of the Opinion:

> "Firmly committed as we are to the proposition that while it is the duty of the trial judge to conduct the trial with firmness, understanding and judgment,

it is equally his duty to conduct it with patience, fairness and moderation, and that he is not to dominate the trial or do more than, as administrator, to keep it within legal bounds * * *".

At page 388 of the same opinion the Court expressed its feelings as follows:

> *"We are committed to the view that it is the essence of a fair trial that the judge conduct it with complete disinterestedness, and if he fails to do so, judgment will be reversed."* (italics ours)

In *Hunter* v. *U. S.*, 62 Fed. (2d) 217 (5 Cir.), the judge cross-examined the appellant. Here the court stated:

> "That the district judge did not intend to be unfair is beside the question. The case was tried in such a way that the jury * * * might well have reached the conclusion that he (the judge) was not impartial, but was insisting upon a conviction. *It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted."* (italics ours)

Thus, in summary, the analogous decisions of this Court, and those of circuits other than the Seventh, point out:

A. It is vastly more important that the attitude of the trial judge be impartial than that any particular defendant, however guilty he may be, should be convicted. *Hunter* v. *U. S.*, 62 Fed. (2d) 217 (5 Cir.)

B. It is the essence of a fair trial that the judge conduct it with complete disinterestedness. *Baker* v. *U. S.*, 156 Fed. (2d) 386 (5 Cir.)

C. A trial by a biased judge is not in conformity with due process of law. *National Labor Relations Board* v. *Ford Motor Company*, 114 Fed. (2d) 905 (6 Cir.)

D. That the district judge did not intend to be unfair is beside the question. *Hunter* v. *U. S.*, 62 Fed. (2d) 217 (5 Cir.)

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E. If the remarks of the trial judge or his manner of presiding over the trial cut into the presumption of innocence to which the defendant is entitled, and this may have influenced the jury, the defendant has not received a fair trial. *U. S.* v. *Brandt,* 196 Fed. (2d) 653 (2 Cir.). *Kotteakos* v. *U. S.,* 328 U. S. 750.

F. If the judge demonstrates a bias which may have influenced the jury, the rights of each defendant were impaired. *Peckham* v. *U. S.,* 210 Fed. (2d) 693 (D. C. Cir.).

G. If the probable influence of the remarks of the judge upon the jury were prejudicial, a Court of Appeals will take notice of the errors even though they were not brought to the attention of the trial court. *Robertson* v. *U. S.,* 171 Fed. (2d) 345 (D. C. Cir.).

H. An Apppeals Court in making a determination can determine only whether the remarks of the court might have influenced the jury, and has no right to state its belief as to the guilt or innocence of the accused and base its decision on such belief, and if the remarks of the trial judge may have influenced the jury the Appeals Court may not affirm even if it is without doubt of the appellant's guilt. *Bollenbach* v. *U. S.,* 326 U. S. 607. *Meeks* v. *U. S.,* 163 Fed. (2d) 598 (9 Cir.).

In the instant case the Court of Appeals for the Seventh Circuit recognized the errors that had been committed, but affirmed the decision because it weighed the evidence, as Justice Frankfurter said in *Bollenbach* v. *U. S.,* "engendered by the dead record", and found that such evidence pointed to the guilt of each of the defendants. This reasoning is in direct conflict with all of the above decisions of this Court, and of other circuits. This gives basis for granting the Writ of Certiorari.

CONCLUSION.

For the reasons above stated, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

WILLIAM MCGOWAN,
Petitioner.

By: IRVING S. ABRAMS and
MAURICE A. WINKLER,
His Attorneys.

MAURICE A. WINKLER,
Of Counsel.

Chicago, Illinois,
April 12, 1955.

APPENDIX I.

Consolidated Nos. 11156-11157.

OCTOBER TERM, 1954, JANUARY SESSION, 1955.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
SHELDON WHEELER AND WILLIAM McGOWAN,
Defendants-Appellants.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

January 25, 1955.

Before DUFFY, *Chief Judge,* FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

DUFFY, *Chief Judge.* In Counts 2, 3, 4 and 5 of the indictment defendants Wheeler and McGowan were each charged with violating the Dyer Act in that each of them transported or caused to be transported in interstate commerce an automobile described in the indictment, knowing the same to have been stolen. Count 6 charged a conspiracy to violate the same statute. Count 2 charged the transportation of a stolen 1950 Chrysler from Chicago to Austin, Minnesota; Count 3, the transportation of a stolen 1950 Pontiac from Chicago to Austin, Minnesota; Count 4, the same offense as to a 1950 DeSoto from Chicago to Mason City, Iowa; Count 5 was dismissed on motion of the government. The jury found each defendant guilty as charged and each was sentenced to imprisonment for 5 years and to pay a fine of $5,000.

The sentence imposed upon the jury verdict of guilty was such that if the evidence is sufficient to sustain the convic-

tion on any one count, the judgment of conviction herein must be sustained, *Butler* v. *United States,* 7 Cir., 138 F. 2d 977, 981; *United States* v. *Kelly,* 7 Cir., 186 F. 2d 598, 602, assuming, of course, that the defendants had a fair trial, free from prejudicial error. We shall, therefore, first consider the proof as to Count 2 which refers to the 1950 Chrysler.

Sidney Peven, son of Joe Peven, testified that his father's 1950 four door Chrysler automobile, Motor No. C-4831166, had disappeared from in front of their home in Chicago on September 20, 1950, and that neither he nor his father had given anyone permission to take or use the automobile.

Witness Harkness also testified with reference to the 1950 Chrysler, and his testimony is vigorously assailed by each defendant. They claim that Harkness testified as an expert witness, but had shown no qualifications therefor. Undoubtedly, his testimony was damaging to each defendant. For more than thirty years Harkness has been a special agent for the National Automobile Theft Bureau. He explained that the Theft Bureau maintained records of practically every automobile reported stolen in the United States, and that his job was to assist law enforcement officers in identification of stolen automobiles where the identification numbers had been altered. Over repeated objections he explained that automobile manufacturers stamp motor and serial numbers in locations in each automobile which are well known, but that they also stamp the same number in each automobile in a secret location so that if the original public numbers are eliminated or changed the automobile can still be identified by him or members of the FBI who know the locations of the secret numbers. He further testified that after a manufacturer once uses a certain number for identification on an automobile, the same number is not again used. Harkness then testified that the 1950 Chrysler described in Count 2 had been examined by him at Brainerd, Minnesota; that the public numbers had been filed off and a new number C-4861744 had been substituted; that his examination

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showed the secret number was C-4833166 which was proved to be the identifying number of the 1950 Chrysler which had been owned by Joe Peven of Chicago.

All of the foregoing testimony was clearly relevant and admissible and objections thereto were properly overruled. But, say defendants, some of Harkness' expert testimony indicated that the defendants were guilty of the offenses charged. To illustrate, Harkness was asked: "Why would anyone want to disguise the identification of an automobile?" and he answered: "Because if it was a stolen automobile, they would have to change the number in order to get it registered so that they could sell it." Defendants insist that by the use of the word "they" Harkness implied that the two defendants in the case at bar had made changes in the identification of the numbers of the automobiles described in the indictment. We think the objection is far-fetched and without merit.

Leo Reddington, bookkeeper of B & J Motors, Beloit, Wisconsin, was shown an application for a State of Wisconsin Motor Vehicle Registration dated September 5, 1950 which showed B & J Motors as the seller and one Donald Carter as the purchaser of a 1950 four door Chrysler. The motor number stated on the application was C-4861744. Reddington testified the records of B & J Motors did not disclose the sale of an automobile of that description to Donald Carter or anyone else, and further, that he could not recognize the purported signature of the seller.

The proof further disclosed that Orville Millenacker purchased a 1950 four door Chrysler, Motor No. C-4861744, from the defendant McGowan to whom he paid cash in the sum of $500 and turned over a check for $1300 payable to Shelly Motor Co. Proof further showed that defendant Wheeler endorsed the $1300 check. Defendant's own proof showed that defendant Wheeler owned a used car business operated under the name of Shelly Motor Co., and that defendant McGowan operated same for him on a commission basis.

Because the evidence clearly supports the judgment of conviction on Count 2, detailed evidence need not be stated

as to the proofs supporting Count 3 (1950 Pontiac) and Count 4 (1950 DeSoto). Suffice to say, in each case it was proved that the described automobiles were stolen, and that the public numbers had been changed. Proof was then made as to the secret number of each automobile, that sales thereof were made by the defendant McGowan in Minnesota and in Iowa, that checks were taken by McGowan payable to Shelly Motor Co. or Shelly Auto Co., and that said checks were cleared in due course through the banks.

As to Count 6, the conspiracy charge, it is sufficient to point out that Wheeler testified that he and McGowan were associated in the purchase and sale of the three automobiles described in the indictment, each of which the government proved was stolen, and shortly thereafter said automobiles turned up in Minnesota and Iowa in the possession of the defendant McGowan.

We think the evidence clearly supports the jury's finding of guilt as to each defendant on Counts 2, 3, 4 and 6. We proceed, therefore, to consider the alleged errors. As we have heretofore discussed the testimony of Harkness, no further reference thereto need be made.

We have considered the claims of the defendants that error was committed because of the receipt of incompetent and prejudicial evidence. The principal objection in this category is with reference to the testimony of Leo Reddington and C. William Bladon. Reddington, the bookkeeper of B & J Motors, testified that B & J Motors did not sell a 1950 Chrysler described in the indictment to one Donald Carter. Bladon, the proprietor of Bladon Motors, testified that his Company did not sell a 1950 Pontiac described in the indictment to any one. Bladon also testified that the purported signature on the application for Wisconsin Motor Vehicle Registration under the typewritten words "Bladon Motors" was not the signature of anyone working for him, and that there was no such person as "J. Bladon, Jr.", which name appeared on the registration application.

Defendants contend that neither Reddington's nor Bladon's testimony should have been received because the

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books and the records of each company were the best evidence as to whether such sales had been made. This objection clearly has no merit as to Bladon's testimony. While he admitted, on cross examination, that he had examined the books and records of his Company about a week before the trial, he positively stated on the stand that he was testifying from his own knowledge.

The following appears in Reddington's testimony: "Q. Did the B & J Motors ever sell a Chrysler of that serial number to Donald Carter? A. No, sir. Q. Did they sell a Chrysler of that serial upmber to anyone? A. No, sir." True, Reddington testified that he had looked over the inventory cards of B & J Motors about one week previous to the date of the trial and, undoubtedly, such examination re-assured his understanding and refreshed his memory that a sale of the Chrysler described in the indictment had not been made to the fictitious person, Donald Carter, on or about September 5, 1950. No demand or request was made for the production of the inventory cards. Upon request the District Court would, undoubtedly, have required their production. The best evidence rule has some limitations. The original document is, of course, the best evidence of its contents, but what is the best evidence of the non-existence of a document? We do not think there was error in admitting Reddington's testimony, certainly no prejudicial error.

We also hold there was no undue restriction upon defendants' right to cross examine government witnesses. The extent of such cross examination is in the discretion of the trial judge. We will review only to determine whether there has been an abuse of discretion. We find no such abuse here.

However, we must discuss briefly the claim of the defendants that sarcastic and prejudicial remarks of the trial judge made in the presence of the jury deprived the defendants of a fair and impartial trial.

Each defendant was represented at the trial by his own attorney. It would seem that there was no occasion for the trial judge to be confused as to which attorney repre-

sented each defendant. However, on a number of occasions the trial judge interrupted McGowan's attorney asking which defendant he represented. The defendants claim that such remarks were extremely damaging to them especially upon the charge of conspiracy, that the court implied that defendants were operating in concert, even in the court room to such an extent that the Judge could not tell which attorney was representing each defendant.

When witness Kessler was on the stand, Wheeler's attorney asked whether he had ever seen Wheeler before the trial. The government objected and the court said (R. 25) "Sustained. That is the sort of thing you did not want to go into, Mr. Berkson. If you want to keep it brief, we will keep it brief for you. We will narrow the issues."

Defendant Wheeler contends that this remark was sarcastic, uncalled for and prejudicial, especially in view of the fact that nowhere previously had Mr. Berkson requested that the trial be kept brief. Each defendant claimed it showed another instance of the trial judge's hostility toward the defendants.

Attorney Berkson had finished reading a number of questions and answers from a deposition preparatory to asking a witness whether those questions had been asked of him, and whether he had made those answers. The government objected, and the trial judge said: "I was waiting for the objection. I will sustain the objection." Counsel for Wheeler summarizes his claim of error due to the conduct of the trial judge by saying: "In many instances throughout the record the trial judge exhibited evidence of hostility and antagonism toward counsel for the defendants. By comparison, the court's attitude to counsel for the government was one of overwhelming approval of everything he did, even to the extent of putting words into his mouth, giving him reasons to assign and even helping out the government's witnesses by stating what the court believed the witness meant in cases where the answers of the witness were confusing."

It is, of course, the duty of the trial judge to endeavor to maintain throughout the trial an atmosphere of impar-

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tiality, and to conduct the trial in an orderly way with a view of eliciting the truth and of attaining justice between the parties.

We think it was error to volunteer the statement in the presence of the jury that the objection which the government finally made was the one the trial judge had been waiting for, and he apparently sustained the objection with considerable vigor and enthusiasm. We think it appropriate to repeat what we said in *United States* v. *Levi*, 177 F. 2d 833, 836: "The influence of the trial judge on the jury is necessarily and properly of great weight, *Starr* v. *United States*, 153 U. S. 614, 626, and jurors are ever watchful of the words which fall from him. 'The judge occupies a position of great influence with the jury in conducting a trial; * * * he should be careful not * * * to say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts.' *Virginian Ry. Co.* v. *Armentrout*, 4 Cir., 166 F. 2d 400, 405."

We recognize that a judge conducting a jury trial in the Federal Court is not a mere moderator, *Quercia* v. *United States*, 289 U. S. 466, 469, and appellate courts must guard against the magnification on appeal of instances which were of little importance in their setting. *Glasser* v. *United States*, 315 U. S. 60, 83. We have concluded that in view of the great weight of the evidence in the case at bar pointing to the guilt of each defendant, that the errors were harmless in this case and that judgment of conviction should be

AFFIRMED.

FINNEGAN, *Circuit Judge*, concurring. Since these convictions rest squarely upon substantial evidence, *United States* v. *Thayer*, 209 F. 2d 534 (7th Cir. 1954), traced in a record free of reversible error, I approve this affirmance. I would add, however, some comments because of certain overtones implicit in the arsnecript.

According to common experience few shafts strike deeper into jurors' minds, during trial, than words spoken by the presiding judge. It is also perfectly clear that the

practical repercussions of his various utterances cannot always be clearly traced to and through jury verdicts. Yet trial judges possess such flexibility as may be necessary for properly performing their functions. The core problem of a trial judge lies in striking and maintaining that delicate balance between himself and the triers of fact. Since the metes and bounds of judicial conduct, during a trial by jury, are difficult to delineate, much less to reduce to a concise simple formula, I think it is worth underscoring some of its aspects when appropriate instances arise.

Here, the district judge's remarks were more impertinent, than prejudicial. I am satisfied that no impingement on the defendants' rights resulted from the judge's unsuitable phraseology. When a trial judge assumes the role of a caustic critic he skirts the border of partisan participation.

SCHNACKENBERG, *Circuit Judge*, concurring.

I believe the District Court committed errors in permitting government witnesses Reddington and Bladon to give certain material testimony on direct examination, over objection, inasmuch as it appeared that such testimony was based upon what they had learned from examining certain records. The records were not introduced into evidence nor was there any showing that they were unavailable. The records were the best evidence and the testimony of the witnesses was secondary evidence. The government showed no reason for the non-production of the best evidence.

However, in view of the other evidence in the record showing the guilt of the defendants, these errors were not prejudicial and do not require a new trial.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX II.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Tuesday, January 25, 1955

Before

HON. F. RYAN DUFFY, *Chief Judge*

HON. PHILIP J. FINNEGAN, *Circuit Judge*

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 11157

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* WILLIAM McGOWAN, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby

AFFIRMED.

APPENDIX III.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, March 16, 1955

Before

HON. F. RYAN DUFFY, *Chief Judge*

HON. PHILIP J. FINNEGAN, *Circuit Judge*

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 11156-57

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* SHELDON WHEELER, WILLIAM McGOWAN, *Defendants-Appellants.*	Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby,

DENIED.

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APPENDIX IV.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois
Tuesday, March 22, 1955
Before

HON. F. RYAN DUFFY, *Chief Judge*

No. 11157

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* WILLIAM McGOWAN, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for defendant-appellant, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed for a period of thirty (30) days pursuant to the provisions of Rule 25 of the Rules of this Court.